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United States

OCTOBER TERM 1990

COUNTY OF RIVERSIDE and COIS BYRD,
SHERIFF OF RIVERSIDE COUNTY,
Petitioners,

VS.

DONALD LEE MCLAUGHLIN, et al.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS ON BEHALF OF THE YOUTH LAW CENTER

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INTEREST OF THE AMICUS CURIAE

The Youth Law Center is a non-profit public interest law organization which is dedicated to the protection of the rights of young people. The attorneys and staff of the Youth Law Center engage in a variety of advocacy activities, including litigation over violations of constitutional and statutory rights of children. The litigation docket of the Center includes a large number of cases that challenge the conditions and procedures of institutional confinement. The majority of these cases are class action cases conducted pursuant to 42 U.S.C. § 1983.

The Youth Law Center represents youth in civil rights litigation in jails, juvenile detention centers, juvenile training schools, and adult prisons. It is the rule in these cases, rather than the exception, that named plaintiffs and class representatives who are confined at the commencement of the litigation are released or transferred, or otherwise undergo some change in legal status, during the pendency of the litigation. Classes of juvenile plaintiffs are generally even more transitory than classes of incarcerated adults because periods of detention or other confinement tend to be relatively brief. In our cases we often rely on the principles articulated by this Court in Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975), when issues of standing or mootness are raised. Gerstein provides an exception to the general rule in cases involving transitory claims for cases "capable of repetition, yet evading review." This Amicus brief in support of the respondent will address the im-

portance of that exception in the context of institutional litigation.

ARGUMENT

The principle of standing established in Gerstein is essential to remedy constitutional violations in institutional cases.

The courts have long recognized that cases may arise in which constitutional violations have occurred, but are of such short duration that individual plaintiffs may lose their standing to pursue injunctive relief. The class action is the vehicle by which injunctive relief may be pursued in such cases. Sosna v. Iowa, 419 U.S. 393, 399 (1974); Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975); United States Parole Commission v. Geraghty, 445 U.S. 388, 398 (1980).

Lawyers at the Youth Law Center, as well as our colleagues at the American Civil Liberties Union National Prison Project, the Mental Health Law Project, the National Center for Youth Law, and others, including independent litigators such as the counsel of record for the plaintiffs here, comply with the procedural requirements described in the above cases: when injunctive relief is sought, named plaintiffs and plaintiff representatives are incarcerated in the institution in question, and are suffering from the alleged harms, at the commencement of litigation. A request for class certification is included in the complaint. This practice meets the standing requirement of Sosna and Gerstein and

assures the adequacy of representation of the class required by Rule 23, Fed. R. Civ. P. As a general matter, named plaintiffs and plaintiff representatives must be members of the class at the time of class certification. However, Sosna and Gerstein provide for an exception in the event of transitory claims for which no individual will retain standing long enough for the court to rule on class certification.[1] The plaintiffs in this case have clearly met these requirements.

The situation is different for constitutional claims by individual plaintiffs. In City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983), the Court made clear that in order for an individual plaintiff to retain standing to pursue injunctive relief, he must make a showing of a "real and immediate threat" of a future constitutional violation, id. at 105, regardless of any violations that might already have occurred. In that case, since Lyons could not make such a showing, his claim for injunctive relief was dismissed. In a class action, the standing requirement is satisfied because members of the class continue to face the "real and immediate threat" of

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[1] These principles are widely accepted among the federal courts. See White v. Matthews, 559 F.2d 852, 857 (2d Cir. 1977); Wilkerson v. Bowen, 828 F.2d 117, 121 (3rd Cir. 1987); Jones v. Diamond, 519 F.2d 1090, 1097 (5th Cir. 1975); Ball v. Wagers, 795 F.2d 579, 581 (6th Cir. 1986); Robinson v. City of Chicago, 868 F.2d 959, 968 (7th Cir. 1989); Reed v. Bowen, 849 F.2d 1307, 1310 (10th Cir. 1988); In re Thornburgh, 869 F.2d 1503, 1509 n. 7 (D.C. Cir. 1989); Cruz v. Collazo, 84 F.R.D. 307, 316 (D.P.R. 1979); Avery v. Powell, 695 F. Supp. 632, 642 n. 13 (D.N.H. 1988); But cf. Tucker v. Phyfer, 819 F.2d 1030 (11th Cir. 1987) (proposed named plaintiff aged out of class before class certification was requested).

future constitutional violation. The Gerstein exception for class actions was not addressed in Lyons.

The gist of the argument of the defendants is that the principle of Lyons should be extended to apply to class action cases. Simply put, their argument is that for any plaintiff who has suffered a constitutional violation to be eligible for injunctive relief, regardless of whether he is a member or representative of a class suffering similar violations, a showing must be made that the violation at issue will happen, to him, again. Defendants argue that it should not matter that the violation will occur to other members of the class, even if the unconstitutional conduct is the result of clearly stated policy and is certain to reoccur. The suggestion of the defendants is a novel one, and is unsupported by precedent. Perhaps that is why the issue was so quickly disposed of by the Ninth Circuit.[2]

Such an extension of the principles of Lyons would have a profound negative effect upon the ability of classes of incarcerated or institutionalized plaintiffs to obtain relief from illegal conduct which results in violations of their constitutional rights. This possibility is cause for concern in situations such as that presently at issue, i.e., the systematic denial of prompt probable cause determinations before incarceration, but becomes even more disturbing upon consideration of other types of violations that frequently occur in institutions, such as

[2] It is also clear that if this argument were accepted, this Court would not have had jurisdiction to decide Gerstein, as well as Schall v. Martin, 467 U.S. 253 (1984), which was decided after Lyons.

extended isolation, lack of proper sanitation, inadequate fire safety, and improper use of mechanical restraints. Life-threatening practices continue to occur in institutions, and often the only effective means of protecting plaintiffs is the federal court injunction. The Youth Law Center has had substantial experience in such situations.

For example, in Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983), a class of juvenile plaintiffs challenged conditions at the Provo Canyon School in Utah. The oppressive and dangerous conditions included the practice of grasping children's hair and pulling backward, called the "hair dance"; locking children up in tiny isolation cells for long periods of time; and subjecting children to polygraph tests as part of their "therapy". The damages portion of the case was tried before a jury, and the court later entered a permanent injunction prohibiting the challenged practices. The Court of Appeals for the Tenth Circuit specifically considered the issue of standing. Id. at 936-38. On the date the lawsuit was filed, the District Court had ordered that the named plaintiffs be removed from the facility and placed elsewhere because of the threat of retaliation against them. The class had not been certified at that time. The defendants challenged the standing of the named plaintiffs. The Court of Appeals applied the rule of Gerstein in affirming the District Court decision that the named plaintiffs met the standing requirements, because they were in the facility at the time the complaint was filed, and that the class was properly certified.

In Bobby M. v. Martinez, Civ. Case No. TCA 83-

7003 MMP (N.D. Fla. January 5, 1983) (Complaint), a class of over 1200 children challenged the conditions of their confinement in three Florida training schools. A preliminary injunction was issued that prohibited the practice of "hogtying" which consisted of binding hands and feet with metal handcuffs and strapping the connecting chains of the cuffs together behind the child's back. It was discovered that children as young as ten years old were subjected to this practice, and were allowed to remain chained in this fashion for several hours or days at a time. Even after the state Inspector General condemned the practice in a report to the Legislature, the practice persisted until it was enjoined by the federal court. Id. (Order on Preliminary Injunction, July 14, 1983.) The District Court issued another injunction that prohibited the extensive use of isolation of children in strip cells. Id. (Order on Use of Security Units and Lockup, July 5, 1984.) Children ten, eleven and twelve years of age were often held in isolation for periods of more than a month, without access to books, television, or regular contact with other people. Because of these injunctions, mechanical restraints and isolation are no longer used in these institutions.

During the investigation of the Bobby M. case, plaintiffs' counsel discovered a group of teenage boys with chicken pox who, because they were thought to be infectious, were housed in a storage closet that had no ventilation, no toilet or bath facilities, and no sheets for their plastic covered mattresses. A consent decree was entered in the case which required the state to provide adequate medical care. Id. (Consent Decree, May 8,

1987.)

Danny O. v. Bowman, Civil No. 84-1272 (D. Idaho July 12, 1985) (Judgment) involved children held at the State Youth Services Center in St. Anthony, Idaho. Children were punished in this institution by being placed in strait jackets, attached to hooks, and hoisted to hang upside down from the ceiling. They were also forced to stand against walls and sit on chairs for excruciatingly long periods of time, often for days. The case was tried before the federal court and these practices were found to violate the constitutional rights of the plaintiffs and were prohibited.

In Gary H. v. Hegstrom, 831 F.2d 1430, 1433-37 (9th Cir. 1987) (Ferguson, J., concurring), children were placed in filthy isolation cells for extended periods of time. In Robert K. v. Bell, Civil Action No. 83-287-0 (D.S.C. April 30, 1984) (Consent Decree), the court restricted the practice of placing mentally disturbed children naked in four point restraints and forcibly injecting them with psychotropic drugs. These are just a few examples of the types of practices for which plaintiffs turn to the courts for protection. Actions for damages after the harm has been done, as suggested by the defendants, are not sufficient to protect children from these abusive violations.

Similar cases arise which involve children who are held in adult jails. Even though this practice has been roundly condemned, and federal statutes provide incentives to its prohibition by the states, see Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5600, et seq. (1974), it continues. In these instances

standing is a critical issue because confinement, as in Gerstein, is usually brief. As the court noted in the leading case of D.B. v. Tewksbury, 445 F. Supp. 896, 898 (D.C. Or. 1982),[3] "Children do not stay in CCCF for long periods of time... 70 percent of the children who were confined in CCCF in 1981 were released within 24 hours." The case proceeded to trial as a class action and resulted in a ruling that incarceration of any child in that facility pending adjudication by the juvenile court was a violation of the Fourteenth Amendment. The conditions in this jail were truly appalling:

> Children held in CCCF are not issued sheets, mattress covers or pillows. They sleep on mattresses covered with urethane and they are given a wool blanket. Occasionally children are not given mattresses. Those children placed in isolation cells sleep on cement floors.
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> * * * *
>
> No child lodged in CCCF may have underwear.
>
> * * * *
>
> Toilet facilities at CCCF ar not screened from view... [f]emale children using the toilet or shower are visible to male corrections officers. Male children using the toilet are visible to matrons.
>
> * * * *
>
> Children in CCCF are sometimes placed in either of two isolation cells. These are 8'x 8' windowless concrete block rooms, barren of all furniture

[3] This case was not litigated by the Youth Law Center.

> and furnishings. Sometimes it is very cold in the isolation cells. Near the center of the isolation cell there is a sewer hole which is the only facility for urination and defecation.... When the mechanism for the sewer is flushed by a corrections staff officer, water and sewage gushes onto the cell floor. 445 F. Supp. at 898-99.

Clearly individual damage actions were not the answer for the hundreds of children who had been held in this Oregon jail; injunctive relief was the only sensible legal method for preventing further harm. It made sense for the children and it also made sense for the court. The remedial injunction is the only effective means of ending such abuses. Damages are retrospective and restorative and are traditional actions at law; injunctions are prospective and protective and are traditional actions in equity. 11 Wright and Miller, Federal Practice and Procedure § 2941 (1973). Their purposes are not interchangeable. Rule 23(b) Fed. R. Civ. P. specifically anticipates injunctive claims in class actions.

These cases have been important in protecting children from unconstitutional practices. Injunctive relief would have been impossible in virtually all of them if each member of the class had been required to show that the challenged practices were certain to happen to each of them, personally, in the future, as would be required under Lyons.

In their brief at p. 23, defendants ask "What interest do the named plaintiffs have in vigorously litigating the question of whether individuals who may be arrested in the future will receive prompt probable cause determinations which, according to the allegations of their complaint, they did not (and indeed now can-

not) receive?" (emphasis in original) The answer is that their interest is in protecting the unnamed members of their class, whom they are charged with representing, from the harm that they have suffered. Geraghty, supra, 445 U.S. at 398. This is the essence of the class action, and the underlying rationale for all the principles and procedures which have developed around such litigation.

CONCLUSION

In our federal system, courts are often faced with the delicate balance of protecting plaintiffs' constitutional rights while also protecting the important principles of equity, comity, and federalism. But the defendants here are asking the Court to go too far. The argument they press would make it virtually impossible for institutionalized plaintiffs to pursue injunctive relief to protect themselves from policies and practices that result in violations of their constitutional rights. For these reasons, the Court should leave long precedent undisturbed, and should reject the argument of the defendants on the issue of standing.

Respectfully submitted,

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